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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ELIZABETH R., a Person Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

RANDALL R.,

Defendant and Appellant.

D053842

(Super. Ct. No. J508703F)

APPEAL from orders of the Superior Court of San Diego County, Gary Bubis,
Judge. Affirmed.

Randall R. appeals orders terminating his parental rights to his daughter, Elizabeth R., and an order summarily denying his petition under Welfare and Institutions Code¹ section 388. He contends substantial evidence does not support the court's finding

¹ Statutory references are to the Welfare and Institutions Code.

Elizabeth is adoptable, and the court erred by denying his petition without a hearing. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

This case began in April 2000 when four-year-old Elizabeth and three of her older siblings were taken into protective custody on the basis of Randall's mental illness, excessive use of alcohol and his and the children's mother's domestic violence. Also, there was suspicion Randall had sexually abused one of Elizabeth's older sisters. The juvenile court declared Elizabeth a dependent child of the court and placed her with a paternal aunt (the aunt).

During the following 18 months Randall made some efforts to comply with his reunification plan, and he visited Elizabeth. In August 2001 he began having unsupervised visits with her and her two sisters. Elizabeth continued to live in the aunt's home with her sisters. The aunt was willing to provide care for them, but not to adopt them or become their guardian. At the 18-month hearing in November 2001, the court terminated Randall's services, continued Elizabeth's placement with the aunt and authorized continuation of family therapy and visits. So not to disturb Elizabeth's placement with her siblings in relative care, the court found she was not a proper subject for adoption and there was no one willing to accept legal guardianship of her.

On February 18, 2003, the San Diego County Health and Human Services Agency (the Agency) petitioned under section 342, alleging Randall had sexually abused Elizabeth's sisters during unsupervised visits and had been sexually abusing them for

years. The court found the allegations true. Randall was convicted of the sexual abuse and sent to prison.

Elizabeth continued to live with the aunt for four more years. In May 2007 when she was 11 years old, she moved twice to live with two different aunts. In November she moved to the home of nonrelative extended family members, Mr. and Mrs. S.K. The social worker reported Randall had sent Elizabeth extremely inappropriate letters that included references to his sexual abuse of her sisters. Elizabeth asked that she not receive any more letters from him. The court ordered they would have no contact. In February 2008 the court set a section 366.26 hearing.

The social worker opined Elizabeth was adoptable. She was healthy, developing normally, doing well in school and was cute and bright. She had been in protective custody for eight years and had had five relative placements, including placement for almost seven years with the aunt. Mr. and Mrs. S.K. were committed to adopting her and had begun their home study. Elizabeth said she felt safe and secure with them, and they treated her as part of their family. In addition, two other approved families in San Diego County and as many as 40 out-of-county families were interested in adopting a girl with Elizabeth's characteristics.

For the section 366.26 hearing, Randall waived his presence and expressly gave permission for Elizabeth to be adopted. His counsel filed a section 388 petition, requesting Randall have contact with Elizabeth by letter or telephone.

At the hearing on August 18, 2008, Randall's counsel reiterated Randall was in agreement with the recommendation of Elizabeth being adopted. After receiving

documentary evidence, the court terminated parental rights and found none of the statutory exceptions to adoption were present. It continued Elizabeth's placement with Mr. and Mrs. S.K. and designated adoption as the permanent plan. It denied Randall's section 388 petition, finding he did not have standing because his parental rights had been terminated, and, even if the court were to rule on the petition, it would find Randall had not made a prima facie showing.

DISCUSSION

I

Randall contends the finding Elizabeth was adoptable was not supported by substantial evidence. He argues she was declared not adoptable for the years she was in relative care, and at the time of the hearing, had been with her current caregivers for only four months.

Randall has forfeited his argument. "A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221-222.) A "reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] . . . [¶] Dependency matters are not exempt from this rule." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. omitted.)

The record shows Randall expressly approved of Elizabeth being adopted. He wrote a letter to the court and his counsel, stating "I give permission [*sic*] for my daughter Elizabeth [] to be adopted." At trial his counsel stated Randall agreed with the social

worker's recommendation that Elizabeth be adopted. By expressly approving of the recommendation for adoption, Randall has forfeited the issue.

Moreover, even if we were to reach the merits of Randall's argument, we would hold he has not shown a lack of substantial evidence to support the court's finding Elizabeth is adoptable.

Before a court frees a child for adoption it must determine by clear and convincing evidence that the child is likely to be adopted within a reasonable time. (§ 366.26, subd. (c)(1); *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223.) "In resolving this issue, the court focuses on the child — whether his age [or her age], physical condition and emotional state make it difficult to find a person willing to adopt him [or her]." (*In re David H.* (1995) 33 Cal.App.4th 368, 378.) The fact that children are with families who want to adopt them supports a finding they are generally adoptable. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.) "On appeal, we review the factual basis for the trial court's finding of adoptability and termination of parental rights for substantial evidence." (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732.) The appellant bears the burden to show that the evidence is insufficient to support the court's findings. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

The fact that Elizabeth was for many years in a permanent plan of another planned living arrangement, rather than adoption, does not mean she was not adoptable. Elizabeth lived with her siblings in the home of the aunt, who was willing to provide continued care, but was not interested in adoption or guardianship. The court found Elizabeth was not a proper subject for adoption, not because of her particular qualities, but because she

was in a sibling group placed with a relative who did not want to adopt. Elizabeth, by herself, was generally adoptable. She possessed many positive attributes making her an attractive subject for adoption. She was happy, cheerful and developmentally on track. Her school work had improved to all A's and B's after she was placed with the K.'s, and she was responding well to their care. The K.'s were committed to adopting her, further supporting the finding she was generally adoptable. Also, there were two approved adoptive families in San Diego County plus as many as 40 families outside of the county interested in adopting a child with her qualities.²

Randall's arguments that Elizabeth's emotional problems preclude a finding of adoptability are without merit. Elizabeth had received counseling throughout her dependency to help her deal with the issues she faced. The reports showed she had made much progress and when she was placed with Mr. and Mrs. S.K., became less anxious and said she felt safe. The fact she was able to benefit from therapy did not make her not adoptable. Substantial evidence supports the court's finding.

II

Randall asserts the court erred when it did not grant a hearing on his section 388 petition. He claims the real purpose of the section 366.26 hearing was to thwart his attempts to visit Elizabeth. He argues the court purposely terminated his parental rights

² We deny the Agency's motion to augment the record with information about Mr. and Mrs. S.K.'s attempts to adopt Elizabeth. Because substantial evidence fully supports the finding Elizabeth was generally adoptable, the information is unnecessary and irrelevant to this opinion.

first and then found he no longer had standing and refused to hear his section 388 petition.

Randall's theory the court purposely impeded his contact with Elizabeth is unsupported. Section 366.3, subdivision (g) requires the court to reassess permanency planning options throughout a child's dependency. The requirements for a section 366.26 assessment report and hearing were triggered when Elizabeth left the aunt's home and the K.'s expressed an interest in adopting her. (§ 366.26, subd. (h).) Elizabeth asked to stop written correspondence with Randall in November 2007. A hearing was scheduled for Randall to present his request for contact with her, but he withdrew the request in March 2008 and did not ask for visitation again until the day scheduled for the section 366.26 hearing. The court acted within its discretion when it held the section 366.26 hearing before considering Randall's section 388 petition. Randall's claim the court violated his due process rights is without merit.

Moreover, the court further found even if Randall did have standing, it would have denied a hearing on the petition because he had not made a prima facie showing. This finding is well supported.

Section 388 provides in part:

"(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. . . .

"[¶] . . . [¶]

"(d) If it appears that the best interests of the child may be promoted by the proposed change of order . . . the court shall order that a hearing be held"

In order to gain the relief sought in a section 388 petition, the petitioner must show both a change of circumstances or new evidence and that the change sought is in the child's best interests. (§ 388; Cal. Rules of Court, rule 5.570(a); *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) A petition is liberally construed in favor of its sufficiency. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.) The petitioner bears the burden of proof, however, to make both showings. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

"[I]f the petition presents *any* evidence that a hearing would promote the best interests of the child, the court must order the hearing." (*In re Angel B., supra*, 97 Cal.App.4th at p. 461.) " ' "The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." ' ' ' (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432.)

The court did not err by finding Randall had not made a prima facie showing. He made no showing that circumstances had changed, and he did not show Elizabeth's best interests would be served by allowing contact. He claimed Elizabeth had written letters showing they had a positive relationship, but he did not attach any letters or provide any details about them. His previous letters had contained very inappropriate remarks. Elizabeth said she did not want any further contact with him. Randall has not shown error.

DISPOSITION

The orders are affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.